

5 Nfld. & P.E.I.R. 325

Jenkins, Re

Newfoundland Supreme Court, Trial Division

Higgins, J.

Judgment: August 22, 1973

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Counsel: **David C. Day**, for applicant.

Gerard Martin, for Director of Child Welfare.

Ronald S. Noseworthy, as amicus curiae.

Higgins, J.:

1 On August 22nd, 1972, at the Twillingate Memorial Hospital in the Town of Twillingate Eileen Jenkins was delivered of a female child. The mother, who was unmarried, was 19 years of age and lived in a small community near Twillingate with her father and an unmarried brother. She was not employed at the time and her father's earnings were not sufficient to provide more than the minimum necessities of life for himself, his daughter and her infant child. The brother, it would seem, made no contribution of any sort to the maintenance of his sister or her child. The father of the child refused to assist the mother in anyway. Apparently because of his circumstances, no order of affiliation was sought against him. Faced with this situation the young woman felt that the only course open to her was to entrust the child to the care and custody of the Director of Child Welfare for the Province of Newfoundland. This was effected by her signing a document entitled a "Non-Ward Agreement". She also signed a document entitled "Consent to Adoption". This Consent was a printed form which contained the consent of Eileen Jenkins to an Order of Adoption with respect to her child (who had been named "Tammy"), in accordance with the provisions of the *Adoption of Children Act*. I note here that, at the time of the hearing of this summons, there was some uncertainty as to the applicable legislation. The Consent to Adoption form, which is dated August 28th, 1972, makes reference to the *Adoption of Children Act 1964*. Counsel for the applicant, in his initial argument, referred to certain sections of the *Adoption of Children Act*, R.S.N. 1970, Cap. 5. A survey of the relevant legislation indicated that the statutory legislation applicable herein is the *Adoption of Children Act, 1972*, and it is on this legislation that the parties subsequently based their arguments. Any references to the Act will therefore be understood to be to the *Adoption of Children Act 1972* (the Act No. 36 of 1972.)

2 Eileen Jenkins remained at home for a short time after the child had been surrendered to the care of the Director of Child Welfare but on September 12, 1972, she went to the Province of Ontario to visit a married sister who was living in Weston, a suburb of Toronto. She took up residence with her sister, brother-in-law and their son. In these friendly surroundings she soon recovered her health and found employment. Her earnings are now such as to admit of her maintaining herself and her child. She is assured of the assistance of her sister in providing a home for herself and her child and in caring for the child while she would be at work. With her situation so greatly improved she determined to regain the custody of her infant daughter. On November 20th, she requested her brother-in law, Winston Churchill, at whose home she was living, to make inquiries as to the steps to be taken to regain the custody of her child. Mr. Churchill visited an adoption agency in Toronto and was advised to get in touch with the Director of Child Welfare in St. John's. He telephoned the Director's office and had a conversation with a Social Worker, a Mrs. Callaghan. He told this Social Worker that his sister-in-law was anxious to regain the custody of her infant child. The Social Worker informed him that the child had been placed for adoption and that if Miss Jenkins wished to pursue the matter further she should consult a lawyer because, in her opinion, the matter would probably have to be brought before this Court. On the same day Mr. Churchill consulted a solicitor in Toronto, a Mr. Birnbaum. This solicitor made some telephone inquiries of a solicitor practicing in Gander, Mr. Lloyd Easton, and about December 1st, he wrote Mr. Easton instructing him to institute proceedings to endeavour to regain for Miss Jenkins the custody of her child. Mr. Easton made inquiries at the Department of Social Services and Rehabilitation on December 5th and was informed that the infant had been placed for adoption and that the initial six months probationary period, a time during which the background and the home environment of the proposed adoptive parents is assessed by social workers of the Department, had begun. Finally, on May 16th of this year, a summons was issued out of this Court directed to the Director of Child Welfare to appear and show cause why a Writ of Habeas Corpus should not issue directed to him to deliver up the child to the applicant Eileen Jenkins. At the hearing of the summons the applicant and the Director were respresented by Counsel. Subsequently, the proposed adoptive parents asked leave to be joined as parties. I refused this application but leave was granted for counsel for the proposed adoptive parents to appear as *amicus curiae*.

3 From the evidence before me it appears that the infant was placed for adoption on November 9th, 1972, for a six month probationary period in accordance with the provisions of the *Adoption of Children Act*. These proposed adoptive parents are a married couple with one other child, a 15 month old girl, also adopted. The husband is 32 and the wife 29. They are both in good health and are financially secure. In the opinion of the social workers who have supervised the adoption process the child is happy and reciprocates the affection shown her by the couple. From a material standpoint therefore it would appear that the welfare of the child, should she remain with the proposed adoptive parents, is assured. I am indebted to counsel for the assistance they have given me in the consideration of this application. In addition to very lucid oral argument I received, at my invitation, supplementary briefs. I am satisfied that the arguments in behalf of all the interested parties have presented a complete statement of the authorities supporting their different positions.

4 For the applicant, Mr. David Day based his position on the principles enunciated in *Re Baby*

*Duffell; Martin v. Duffell*, [\[1950\] S.C.R. 737](#), in *Hepton and Hepton v. Maat*, [\[1957\] S.C.R. 606](#) and in *Re Agar, McNeilly v. Agar*, [\[1958\] S.C.R. 52, 11 D.L.R. \(2d\) 721](#), cases referred to by Schroeder, J.A., in *Re Mugford* (1969), 9 D.L. R. (3rd) 113, at page 119 as "that well-known trinity of authorities." Mr. Day referred also to a recent judgment of the Supreme Court of Ontario, *Re Moores and Feldstein*, [1973] 2 O.L.R. 497, 34 D.L.R. 3d 449. Both the *Mugford* and the *Moores v. Feldstein* cases were decided on the principles first laid down in *Martin v. Duffell* and approved in *Hepton v. Maat* and in *Re Agar, McNeilly v. Agar*.

5 The case of *Martin v. Duffel* is the first of these decisions in point of time. Cartwright, J., (as he then was) in delivering judgment said in [1950] 4 D.L.R. 1 at page 7:

It is, I think, well settled that the mother of an illegitimate child has a right to its custody, and that, *apart from statute* (the italics are mine) she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her. ... It is also clear that the mother of an illegitimate child cannot bind herself by an agreement to deliver up her child to a stranger, and that the Court will, on her application, compel the return of a child delivered pursuant to such an agreement. As stated by Lindly, L.J., in *Reg. v. Barnardo*, [\[1891\] 1 Q.B. 194](#), at page 211:

The Court will not interfere with her (the mother) arbitrarily and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do.

Taking this view of the mother's rights and of the duty of the Court I see no reasons why a mother should not from time to time change her mind as to where, how or by whom her child should be brought up, nor why the Court should interfere with her or refuse to support her, unless circumstances be proved which satisfy the Court that it's duty to the infant requires it to act contrary to her wishes.

And at page 8 of the same report Cartwright, J., said:

It is urged that, in Ontario, these well-settled rules are modified by the provisions of the *Adoption Act* (R.S.O. 1937, C. 218, ss. 3(b)(1)(2), 4(a)) that the mother's consent to adoption once voluntarily given is, in effect irrevocable, or at all events that her withdrawal of such consent can and should be disregarded by the Court unless it appears to be in the best interests of the child that she should be allowed to withdraw it. ... The construction for which the appellants contend would bring about the result that the mother is bound by her consent from the moment of giving it, while the appellants remain free, up to the making of the Order of Adoption, to change their mind. ...

6 This emphasis on maternal rights was repeated with approval in *McNeilly v. Agar*, [\[1958\] S.C.R. 52, 11 D.L.R. \(2d\) 721](#), at page 724 by Locke, J., when he said:

I have examined with care the evidence given in this case and, while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of

the appellants, I have come, with regret, to the conclusion that applying the rule as stated in the decision of this Court in the case of *Duffell and Hepton* it has not been shown that the mother should be refused custody.

7 For the Director of Child Welfare, Mr. Martin submitted that the law as expounded in the *Martin v. Duffell* case and in the other cases in which it was subsequently re-affirmed is no longer applicable in this province. He argued that the *Adoption of Children Act*, 1972, has changed the law. In particular he referred to Section 9(1)(b); 9(8) and 9(9) as altering the doctrine of the rights of the natural mother as paramount and creating a situation where the governing factor in cases such as the present is now what constitutes the best interest of the child. These sub-sections provide as follows:

Section 9(1)(b)(ii) of the *Adoption of Children Act*, 1972 provides that an adoption order shall not be made without the written consent "of the mother only, if the child is born out of wedlock."

Section 9(8) of the Act provides that: "A person giving a consent required under subparagraph (i) or (ii) of paragraph (b) of subsection (1) may, within twenty-one days after the consent is given, cancel it by a document in writing to that effect but otherwise the consent shall, subject to subsection (9), be irrevocable."

Section 9(9) of the Act provides: The Judge, if satisfied that it is in the best interests of the child, may by order cancel a consent referred to in subsection(8).

8 In the case at Bar the effect of Section 9(1)(b)(ii) is that an adoption order shall not be made without the written consent of the mother of the child Tammy Jenkins who was born out of wedlock. It is a matter of agreement that on August 28th, 1972, six days after the birth of the child, the mother signed a form described as a "Consent to Adoption." Paragraph 2 of that form reads as follows:

(2) That of my own free will and accord I hereby consent to an Order of Adoption with respect to the said child under the provisions of the said the *Adoption of Children Act*.

The Act does not specify any particular form of consent. All that it requires is that the consent of the mother be in writing.

9 On this point Mr. Day and Mr. Martin argued strongly as to the meaning to be given to the wording of this form of consent. Mr. Day contended that there is a distinction between the adoption process and the adoption order. He echoed the words of Cartwright, J., in the *Duffell* case:

The construction for which the appellants contend would bring about the result that the mother is bound by her consent from the moment of giving it, while the appellants remain free up to the making of the order of adoption, to change their minds ...

Mr. Day argued that if it was the intention of the legislature that an unwed mother is to consent

to efforts to place the child for adoption and, should these efforts be successful, to the making of an adoption order in respect of that child and that such consent could be given by the mother prior to anyone making an application to adopt that particular child, the adoption legislation should have been so framed as to allow of such action. As the law presently stands it does not admit of such a procedure. Here again there is an echo of the words of Cartwright, J., in *Martin v. Duffell* when he said:

Should the view which I have expressed above as to the proper construction of the *Adoption Act* (the Ontario statute) not be in accordance with the true intention of the legislature such intention could, without difficulty, be expressed in an amendment to the Act.

10 Mr. Martin argued that as the Act makes no stipulation as to the time when the mother's written consent is required, the most practical time for obtaining such a consent would be sometime before the child is placed with prospective adoptive parents for the six month probationary period required by the Act.

11 Mr. Noseworthy who, at my request, submitted a brief on behalf of the proposed adoptive parents, made a submission which I find to be persuasive. He argued that to hold that the required consent could not be given by the mother until the expiry of the probation period would be to defeat the intended purpose of the legislation. He made the point that the probationary period, for which the Act provides, is applicable not to the consent of the natural mother but rather to the relationship between the Director of Child Welfare and the adoptive parents. The Act provides that a consent given by the mother may be revoked by her at any time within 21 days of being given. After that time it may only be revoked as provided for by section 9(9) of the Act by the Judge to whom the application for an adoption order is made. To hold that a natural mother must consent to a specific adoption order in respect of specific applicants would, by implication at least, require that the mother be given certain specific information which could conceivably lead to her discovering the identity of the adoptive parents. Such a course would frustrate the intent and spirit of the legislation.

12 It seems to me that the Newfoundland legislature, most recently in the enactment of the *Adoption of Children Act, 1972*, has done precisely what Cartwright, J., had suggested in 1950 in the *Duffell* case and has changed the basis on which revocation of the maternal consent is allowed. The result is that in a case such as the present, where the natural parent has consented to the adoption, she and the proposed adoptive parents are on an equal basis. That being so the paramount consideration is the welfare of the child. In the *Duffell* case and in those later cases to which I have already referred in which the reasoning of the *Duffell* case was approved, there was an emphasis on the right of the natural parent as opposed to that of the proposed adoptive parents. That consideration received as much, if not more, consideration than did the welfare of the child. In the case of *Mugford v. Children Aid Society of Ottawa* (1970), 9 D.L.R. (3rd) 113, Schroeder, J.A., said at page 121, in referring to the case of *Re Wells, Adoption* [\(1962\), 33 D.L.R. \(2d\) 243](#):

I have grave doubts as to whether the language used in that legislation (R.S.B.C., 1960, C. 303, s. 8(5) which reads "no person who has given his consent to adoption, other than

the child to be adopted, may revoke his consent unless it is shown to the Court's satisfaction that such revocation is in the best interests of the child.") has done more than to shift the onus of proof, leaving undisturbed the importance of considerations stated by Cartwright, J. in *Martin v. Duffell*. ... One cannot over-estimate the importance to a child of living, moving, and having it's being in an environment shared by it's own blood kin where it will enjoy the warmth and affection of the mother who gave it birth. These are but a part of the intangible values which flow from a custom deeply rooted in our way of life against which superior material advantages which a child may enjoy in the home of strangers not blood cannot accurately be measured on the most delicately balanced scales. The law is on the side of the natural parents unless for grave reasons, endangering the welfare of the child, the Court sees fit not to give affect to the parents wishes.

13 As I have said in all the judgments stemming from the *Duffell* case there is the element of the superior rights of parents as opposed to proposed adoptive parents. I incline to the view expressed in the *Wells* case to which reference is made by Schroeder, J.A. In that case the British Columbia Court of Appeal considered that the provincial legislation (of which I have earlier quoted the applicable section 8(5)) had changed the basis upon which revocation of the consent to adoption is permitted and has placed both natural and adoptive parents on an equal basis with the welfare of the child as the paramount consideration. This decision was recently re-affirmed by the British Columbia Court of Appeal in *Re Bennett* (1973), 33 D.L.R. (3rd) 638.

14 I feel that the Newfoundland *Adoption of Children Act*, 1972, the relevant sections of which I have earlier quoted, has effected the same change in the law as was brought about in British Columbia by the *Protection of Children Act*, R.S.B.C. 1960, C. 303, s. 8(5). If that view be correct the ability of the natural mother to support and maintain her child becomes a matter for consideration. She is now twenty years of age and unmarried. She is employed in a job at which she earns approximately \$72.00 a week. In an affidavit dated March 27th, 1973, she states that she is now residing with her sister in Weston, Ontario. The sister is willing to look after the child while the mother is away at work. Her sister's family is composed of the husband and wife and a son. The home is a three-bedroom apartment. I have not been informed as to the financial contribution, if any, which the mother would be expected to make for board and lodging for herself and her child. Disregarding this it is clear that her ability to care for her child is largely dependent on the continued good will of her sister and brother-in-law. The applicant is a young woman and it is not impossible that she may wish to marry at some later date. Whether a potential husband would be prepared to accept the child along with the mother it is impossible to say. On the other hand the proposed adoptive parents are, according to the report of the Director of Child Welfare, a young, healthy couple, who own their own home and who are financially secure. The child has lived with them since November 9th, 1972. Indeed if these proceedings had not arisen I am advised that, at the end of the six month probationary period in May, 1973, the Director would have supported their application for an order of adoption of the child by them. The child herself has known only these parents for over nine months. In these circumstances and feeling as I do that the welfare of the child must prevail over maternal rights I am not prepared to allow the applicant to revoke the consent to adoption given by her on August 22nd, 1972. The application is therefore dismissed. In the circumstances of the case there will be no order as to costs.

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